

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

JOSEPH M. KING,

Plaintiff,

v.

MICHAEL J. ASTRUE,  
Commissioner of Social  
Security,

Defendant.

No. CV-08-179-CI

ORDER GRANTING DEFENDANT'S  
MOTION TO ALTER OR AMEND THE  
JUDGMENT PURSUANT TO FED. R.  
Civ. P. 59(e)

BEFORE THE COURT is Defendant's Motion to Alter or Amend the Judgment Pursuant to FED. R. CIV. P. 59(e). (Ct. Rec. 21.) Attorney Maureen J. Rosette represents Plaintiff; Special Assistant United States Attorney Thomas M. Elsberry represents Defendant. After reviewing the record and the briefs filed by the parties, the court **GRANTS** Defendant's Motion to Alter or Amend the Judgment pursuant to FED. R. CIV. P. 59(e).

**BACKGROUND AND STANDARD OF REVIEW**

Plaintiff Joseph M. King (Plaintiff) filed for disability insurance benefits and social security income on April 15, 2004. Benefits were denied initially and on reconsideration. After a hearing before administrative law judge Richard A. Say on October 13, 2006, the ALJ denied benefits and the Appeals Council denied review. Plaintiff filed a civil action in district court to obtain judicial review of the agency's decision. Plaintiff and Defendant filed cross-Motions for Summary Judgment, and this court entered an Order Granting

ORDER GRANTING DEFENDANT'S MOTION TO ALTER OR AMEND THE JUDGMENT  
PURSUANT TO FED. R. CIV. P. 59(e)-1

1 Plaintiff's Motion for Summary Judgment and Remanding for Additional  
2 Proceedings Pursuant to Sentence Four 42 U.S.C. § 405(g) on May 28,  
3 2009 ("Order Granting Plaintiff's Motion for Summary Judgment").  
4 (Ct. Rec. 19.) Defendant timely filed a Motion to Alter or Amend on  
5 June 5, 2009. (Ct. Rec. 21.) Under FED. R. CIV. P. 59(e), it is  
6 appropriate to alter or amend a judgment if "(1) the district court is  
7 presented with newly discovered evidence, (2) the district court  
8 committed clear error or made an initial decision that was manifestly  
9 unjust, or (3) there was an intervening change in controlling law."  
10 *United Nat. Ins. Co. v. Spectrum Worldwide, Inc.*, 555 F.3d 772, 780  
11 (9th Cir. 2009), citing *Zimmerman v. City of Oakland*, 255 F.3d 734,  
12 740 (9th Cir. 2001).

### 13 **ISSUE**

14 Defendant argues the court should amend or alter its judgment  
15 because it clearly erred by using an incorrect standard for rejecting  
16 an "other source" opinion. (Ct. Rec. 22 at 3-6.) Plaintiff argues  
17 the court did not err in finding that the ALJ's decision was not  
18 supported by substantial evidence. (Ct. Rec. 26 at 2-4.)

### 19 **DISCUSSION**

20 At issue is the January 27, 2005, opinion of Sandra L. Macias, an  
21 MSW intern, co-signed by Bobi Womach Goodson, a licensed social  
22 worker. (Tr. 474-75.) The ALJ assigned little weight to Ms. Macias'  
23 opinion. (Tr. 29.) Plaintiff's Motion for Summary Judgment argued  
24 the ALJ improperly rejected the opinion. (Ct. Rec. 14 at 11-12.) In  
25 its Order Granting Plaintiff's Motion for Summary Judgment, the court  
26 concluded the ALJ erred by failing articulate adequate specific,  
27 legitimate reasons for rejecting Ms. Macias' opinion. (Ct. Rec. 19 at  
28 15.) Defendant's Motion to Alter or Amend the Judgment argues Ms.

1 Macias is an "other source" whose opinion may be rejected for only  
2 "germane" reasons rather than the higher standard of "specific and  
3 legitimate" reasons applied to acceptable medical source opinions.  
4 (Ct. Rec. 22 at 3-6.)

5 In a disability proceeding, the ALJ must consider the opinions of  
6 acceptable medical sources. 20 C.F.R. §§ 404.1527(d), 416.927(d);  
7 S.S.R. 96-2p; S.S.R. 96-6p. Acceptable medical sources include  
8 licensed physicians and psychologists.<sup>1</sup> 20 C.F.R. §§ 404.1513(a),  
9 416.913(a). In addition to evidence from acceptable medical sources,  
10 the ALJ may also use evidence from "other sources" including nurse  
11 practitioners, physicians' assistants, therapists, teachers, social  
12 workers, spouses and other non-medical sources. 20 C.F.R. §§  
13 404.1513(d), 416.913(d).

14 Social Security Ruling 06-3p summarizes regulations providing  
15 that only an acceptable medical source can: (1) establish the  
16 existence of a medically determinable impairment; (2) provide a  
17 medical opinion; and (3) be considered a treating source. Evidence  
18 from other sources can be used to determine the severity of an  
19 impairment and how it affects the ability to work. S.S.R. 06-3p; 20  
20 C.F.R. §§ 404.1513(d), 416.913(d). "Information from other sources  
21 cannot establish the existence of a medically determinable impairment.  
22 . . . However, information from 'other sources' may be based on  
23 special knowledge of the individual and may provide insight into the  
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25 <sup>1</sup> Other acceptable medical sources are licensed podiatrists and  
26 optometrists and qualified speech-language pathologists, in their  
27 respective areas of specialty only. 20 C.F.R. §§ 404.1513(a),  
28 416.913(a).

1 severity of the impairment(s) and how it affects the individual's  
2 ability to function." S.S.R. 06-3p.

3 In evaluating the evidence, the ALJ should give more weight to  
4 the opinion of an acceptable medical source than that of an "other  
5 source." 20 C.F.R. §§ 404.1527, 416.927; *Gomez v. Chater*, 74 F.3d  
6 967, 970-71 (9<sup>th</sup> Cir. 1996). However, the ALJ is required to "consider  
7 observations by non-medical sources as to how an impairment affects a  
8 claimant's ability to work." *Sprague v. Bowen*, 812 F.2d 1226, 1232  
9 (9<sup>th</sup> Cir. 1987).

10 If a treating or examining physician's opinions are not  
11 contradicted, they can be rejected only with "clear and convincing"  
12 reasons. *Lester v. Chater*, 81 F.3d 821, 830 (9<sup>th</sup> Cir. 1996). However,  
13 if contradicted, the ALJ may reject the opinion if he states  
14 "specific," "legitimate" reasons that are supported by substantial  
15 evidence. See *Flaten v. Secretary of Health and Human Serv.*, 44 F.3d  
16 1453, 1463 (9<sup>th</sup> Cir. 1995) (citing *Magallanes v. Bowen*, 881 F.2d 747,  
17 753 (9<sup>th</sup> Cir. 1989); *Fair v. Bowen*, 885 F.2d 597, 605 (9<sup>th</sup> Cir. 1989).

18 An ALJ must give reasons "germane" to "other source" testimony  
19 before discounting it. *Dodrill v. Shalala*, 12 F.3d 915 (9<sup>th</sup> Cir.  
20 1993). Lay testimony can never establish disability absent  
21 corroborating competent medical evidence. See *Nguyen v. Chater*, 100  
22 F.3d 1462, 1467 (9<sup>th</sup> Cir. 1996). It is appropriate to discount lay  
23 testimony if it conflicts with medical evidence. *Vincent v. Heckler*,  
24 739 F.2d 1393, 1395 (9<sup>th</sup> Cir. 1984).

25 Ms. Macias is a social worker and is therefore an "other source,"  
26 not an acceptable medical source. The proper standard for evaluating  
27 the ALJ's consideration of Ms. Macias' opinion is whether the reasons  
28 given by the ALJ were "germane" to Ms. Macias, not whether the reasons

1 cited by the ALJ were "specific and legitimate." Therefore, this  
2 court clearly erred by applying the specific and legitimate standard  
3 to the ALJ's reasons for rejecting Ms. Macias' opinion.

4 Plaintiff argues the ALJ treated Ms. Macias as an acceptable  
5 medical source and, therefore, the ALJ must provide specific,  
6 legitimate reasons for rejecting the opinion. (Ct. Rec. 26 at 2.)  
7 Plaintiff also suggests that because the ALJ did not cite Ms. Macias'  
8 status as an "other source" as a reason for rejecting the opinion, the  
9 Defendant "cannot raise it now." (Ct. Rec. 26 at 2.) While it is  
10 true that the court is constrained to review only those reasons  
11 asserted by the ALJ, *Sec. Exch. Comm'n v. Chenery Corp.*, 332 U.S. 194,  
12 196 (1947); *Pinto V. Massanari*, 249 F.3d 840, 847-48 (9<sup>th</sup> Cir. 2001),  
13 the issue raised by the Motion to Alter or Amend the Judgment is not  
14 the reasons asserted by the ALJ, but the standard for reviewing those  
15 reasons. Plaintiff cites no authority for his arguments, and the  
16 court finds no case law supporting his position. Thus, the court must  
17 review the ALJ's consideration of Ms. Macias' opinion to determine  
18 whether the reasons cited were germane to the source.

19 The ALJ gave two reasons for rejecting Ms. Macias' opinion. The  
20 first reason cited by the ALJ is that opinions rendered on check-box  
21 or form reports which do not contain significant explanation of the  
22 bases for conclusions may appropriately be accorded little or no  
23 weight.<sup>2</sup> (Tr. 29.) The court previously concluded this is a specific,  
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25 <sup>2</sup> This statement gives rise to the inference the ALJ found Ms.  
26 Macias' opinion to be inadequately explained. The court may make  
27 reasonable inferences from the ALJ's discussion of the evidence. See  
28 *Magallenes v. Bowen*, 881 F.2d 747, 755 (9th Cir. 1989).

1 legitimate reason for rejecting a report, and also finds it is a  
2 germane reason for rejecting Ms. Macias' report. As noted in the  
3 Order Granting Plaintiff's Motion for Summary Judgment, individual  
4 medical opinions are preferred over check-box reports. See *Crane v.*  
5 *Shalala*, 76 F.3d 251, 253 (9<sup>th</sup> Cir. 1996); *Murray v. Heckler*, 722 F.2d  
6 499, 501 (9<sup>th</sup> Cir. 1983). Ms. Macias supported the limitations  
7 assessed with only two notes that Plaintiff was uncooperative. (Tr.  
8 474-75.) The lack of explanatory support for the boxes checked by Ms.  
9 Macias constitutes a germane reason for rejecting the report.

10 Plaintiff reiterates his argument that the opinions of reviewing  
11 psychologists Dr. Beaty and Dr. Brown which were also rendered on  
12 check-box forms, but were not rejected by the ALJ. (Ct. Rec. 26 at  
13 3.) The court previously rejected this argument and again rejects it  
14 for the reasons cited in its previous order. (Ct. Rec. 19 at 11-13.)

15 The second reason provided by the ALJ for rejecting Ms. Macias'  
16 opinion is that the definition of "marked" on the DSHS form she  
17 completed differs from the definition contained in the regulations for  
18 assessing mental disorders. (Tr. 29.) The ALJ also asserted the  
19 difference in the definitions means Ms. Macias' opinion is not  
20 entitled to "controlling weight" under 20 C.F.R. §§ 404.1527(e) and  
21 416.927(e), suggesting that it is entitled to no weight for this  
22 reason. The court again finds this is an improper reason for  
23 rejecting Ms. Macias' opinion, even under the "germane" standard, for  
24 the reasons discussed in its previous ruling. (Ct. Rec. 19 at 13-15.)  
25 This error, however, is harmless,<sup>3</sup> because the ALJ cited another

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27 <sup>3</sup>Errors that do not affect the ultimate result are harmless. See  
28 *Parra v. Astrue*, 481 F.3d 742, 747 (9<sup>th</sup> Cir. 2007); *Curry v. Sullivan*,

1 germane reason for rejecting the opinion. See *Valentine v. Comm'r*  
2 *Soc. Sec. Admin.*, \_\_\_ F.3d \_\_\_, 2009 WL 2138981, at \*7 (9th Cir. 2009)  
3 (one germane reason cited by the ALJ found acceptable in rejecting lay  
4 witness evidence); *Lewis v. Apfel*, 236 F.3d 503, 511 (9th Cir. 2001);  
5 see also *Vincent v. Heckler*, 739 F.2d 1393, 1395 (9th Cir. 1985).

6 The ALJ's rejection of Ms. Macias' opinion because it was an  
7 inadequately explained check-box form is germane, legally sufficient,  
8 and supported by the record. The record also reflects other germane  
9 reasons exist to reject Ms. Macias' opinion. The ALJ is not required  
10 to explicitly link his determination to those reasons, as long as they  
11 are noted in the decision. See *Lewis v. Apfel*, 236 F.3d 503, 512 (9<sup>th</sup>  
12 Cir. 2001) ("[i]n all, the ALJ at least noted arguably germane reasons  
13 for dismissing the family members' testimony, even if he did not  
14 clearly link his determination to those reasons").

15 Even if the ALJ erred and Ms. Macias' opinion were credited, the  
16 ultimate nondisability determination would be unchanged. Because Ms.  
17 Macias is an "other source" under the Regulations, her opinion cannot  
18 establish a disability. 20 C.F.R. §§ 1513(d), 416.913(d). Lay  
19 witness testimony is not the equivalent of medically acceptable  
20 diagnostic techniques ordinarily relied upon to establish disability.  
21 *Vincent v. Heckler*, 739 F.2d 1393, 1395 (9th Cir. 1985). The ALJ  
22 adequately explained why other evidence supporting disability was  
23 rejected, and no acceptable medical source whose opinion was credited  
24 by the ALJ opined that Plaintiff was disabled notwithstanding the  
25 effects of drug and alcohol use. Because Ms. Macias' opinion alone

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27 925 F.2d 1127, 1131 (9<sup>th</sup> Cir. 1990); *Booz v. Sec'y of Health & Human*  
28 *Servs.*, 734 F.2d 1378, 1380 (9<sup>th</sup> Cir. 1984).

1 cannot establish disability, any error made in rejecting her opinion  
2 is harmless. *Stout v. Commissioner, Social Sec. Admin.*, 454 F.3d  
3 1050, 1056 (9th Cir. 2006); *Burch v. Barnhart*, 400 F.3d 676, 682 (9th  
4 Cir. 2005); *Curry v. Sullivan*, 925 F.2d 1127, 1131 (9th Cir.  
5 1990)(where corrected error does not change the outcome, the error is  
6 harmless). Thus, the ALJ's decision should be affirmed.

#### 7 CONCLUSION

8 The court's Order Granting Plaintiff's Motion for Summary  
9 judgment remanded the case to the Commissioner to reconsider Ms.  
10 Macias' opinion and justify his findings. However, this court  
11 applied the incorrect standard in reviewing the ALJ's consideration of  
12 an other source opinion, which was clear error. After applying the  
13 proper standard, the court concludes the ALJ provided a germane reason  
14 for rejecting Ms. Macias' opinion and did not err. Therefore, the  
15 court amends the Order Granting Plaintiff's Motion for Summary  
16 Judgment to the extent it is inconsistent with the discussion herein.  
17 The Order is also amended to deny Plaintiff's Motion for Summary  
18 Judgment and grant Defendant's Motion for Summary Judgment. To the  
19 extent consistent with this Order, the court's review of and rulings  
20 on other issues raised by the parties in its Order entered May 28,  
21 2009, are unchanged. Accordingly,

#### 22 IT IS ORDERED:

23 1. Defendant's Motion to Alter or Amend Judgment (**Ct. Rec. 21**)  
24 is **GRANTED**;

25 2. The court's Order Granting Plaintiff's Motion for Summary  
26 Judgment and Remanding for Additional Proceedings Pursuant to Sentence  
27 Four 42 U.S.C. § 405(g) dated May 28, 2009 (**Ct. Rec. 19**) is **AMENDED** to  
28 the extent it is inconsistent with this decision, including 1)



1 Plaintiff's Motion for Summary Judgment (**Ct. Rec. 13**) is **DENIED**; and  
2 2) Defendant's Motion for Summary Judgment (**Ct. Rec. 16**) is **GRANTED**.

3 The District Court Executive is directed to file this Order and  
4 provide a copy to counsel for Plaintiff and Defendant. An amended  
5 judgment shall be entered for Defendant and the file shall be **CLOSED**.

6 DATED August 25, 2009.

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8 S/ CYNTHIA IMBROGNO  
9 UNITED STATES MAGISTRATE JUDGE  
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